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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Southern California Edison (U 338-E) for Approval of the Results of Its 2013 Local Capacity Requirements Request for Offers for the Moorpark Sub-Area.	Application 14-11-016 (Filed November 26, 2014)

APPLICATION OF THE CALIFORNIA ENVIRONMENTAL JUSTICE ALLIANCE AND SIERRA CLUB FOR REHEARING OF DECISION 16-05-050

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On June 1, 2016 the Commission issued its "Decision Approving, In Part, Results of Southern California Edison Company Local Capacity Requirements Request for Offers for the Moorpark Sub-Area Pursuant to Decision 13-02-015" ("D.16-05-050" or "Decision"). The California Environmental Justice Alliance ("CEJA") and Sierra Club submit this Application for Rehearing of D.16-05-050 pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure. D.16-05-050 approved nine contracts, one for the 262 MW gas-fired Puente Power Project ("Puente Project") and eight contracts for a total of approximately 12 MW of energy efficiency and renewable projects. CEJA and Sierra Club's Application for Rehearing is limited to Commission refusal to consider the procurement process that led to Application 14-11-016 and its approval of the Puente contract. This Application for Rehearing does not contest Commission approval of the energy efficiency and renewable projects approved as part of D.16-05-050. This Application for Rehearing is timely filed within 30 days of issuance of D.16-05-050.

I. INTRODUCTION

D.16-05-050 approves a 20-year term contract between SCE and NRG Energy Center Oxnard, LLC ("NRG") for a 262 MW gas-fired simple cycle peaking facility known as the Puente Power Project in Oxnard, California.[1] The communities around the proposed site of the Puente Project are recognized as environmental justice communities that are primarily Latino, while most other communities within the Moorpark sub-area are not.[2] Multiple census tracks in Oxnard rank within the top 20% most environmentally burdened communities in California, as

[1] D.16-05-050 p. 2.
[2] CalEnviroScreen 2.0.

identified by the California Environmental Protection Agency's tool, CalEnviroScreen 2.0.[3] Indeed, the Oxnard area already houses three gas-fired power plants—one of which was sued for unlawful discharges—to power the Moorpark sub-area, and a toxic waste superfund site. As a town largely based on agriculture, the residents of Oxnard also experience a host of health and environmental problems from pesticides.

D.16-05-050 recognizes that Oxnard is an environmental justice community and states that the Commission is "concerned about environmental justice issues[,]" and that "it is not [the Commission's] interest or intent to approve contracts for pollution-causing power plants in disadvantaged communities or other similarly-impacted areas beyond that which is necessary to maintain reliability at reasonable rates."[4] Regardless of the Commission's stated "interest or intent," D.16-05-050 does exactly that – it approves another pollution-causing power plant in a disadvantaged community by improperly dismissing the applicability of environmental justice mandates and policies. Accordingly, D.16-05-050's conclusion that SCE conducted its Request for Offers ("RFO") in a reasonable manner "consistent with the law and Commission decisions" is flawed.[5] CEJA and Sierra Club request that the Commission grant this Application for Rehearing, deny SCE's application with respect to Puente, and order a new RFO that does, in fact, properly consider the environmental justice implications of potential procurement.

II. BACKGROUND

A. The Commission Has a Unique and Critical Role in Evaluating the Environmental Justice Implications of Utility Procurement.

The Commission is the regulatory body with the authority and duty to supervise, enforce requirements, and create policies for the State's investor-owned utilities.[6] The Commission has the unique responsibility of holding utilities publically accountable, and must implement laws and policies that protect the public's interest, including in the utility procurement process.[7] The

[3] Exh. CEJA-1 at 4-8. Cal EPA's CalEnviroScreen 2.0, implementing the legislative instruction in Health & Safety Code § 39711(a) to identify disadvantaged communities, is the standard tool used by state agencies. For example, Pub. Util. Code § 454.42(a)(1)(H), added by SB 350, requires the PUC to ensure that utilities "[m]inimize localized air pollutants and other greenhouse gas emissions, with early priority on disadvantaged communities identified pursuant to [§] 39711 of the Health and Safety Code."
[4] D.16-05-050 p. 16.
[5] D.16-05-050 p. 6.
[6] *See So. Cal. Edison Co. v. PUC,* 85 Cal.App.4th 1086, 1091 (2000).
[7] *See* Cal. Pub. Util. Code § 451; *see also* Cal. Pub. Util. Code §454.5.

California Energy Commission ("CEC"), in contrast, licenses new gas-fired generation, but has no duty or right to review utility conduct and compliance with environmental justice criteria in its procurement plan and process. Instead, for certain types of energy projects, the CEC reviews the potential environmental justice impact of the specific project before it in accordance with its responsibility as lead agency under the California Environmental Quality Act.

Accordingly, the Commission has a critical and unique role in ensuring more equitable procurement. It is at the procurement stage, when bids are first evaluated, where the real opportunity exists to select resources consistent with environmental justice outcomes. Leaving environmental justice review to only the CEC would mean that for some types of resources there would not be environmental justice review by an energy agency at all, and for other resources, review would not occur until long after alternative bids have been rejected. In addition to depriving the utilities of the oversite the Legislature mandates, this result would squander significant opportunities to avoid environmental injustice in the first instance.

B. The LTPP Track 1 and Moorpark Application Decisions.

The Commission issues procurement plans for each of the utilities it oversees. Utility procurement plans, which the Commission must review and approve, contain the up-front standards for procurement activities.[8] On February 13, 2013, the Commission issued a final order regarding Local Capacity Requirements ("LCR") for Southern California Edison Company ("SCE") in D.13-02-015. That decision authorized SCE to procure between 215 and 290 MW of new electrical capacity in the Moorpark sub-area to meet long-term LCR by 2021, and to issue RFOs to solicit proposals to meet this projected need.[9] The Commission set out specific requirements for the procurement plan's contents. The foremost requirement was that the procurement plan "list [] all applicable rules and statutes impacting the plan."[10]

The Commission did not, itself, review the procurement plan SCE designed, but rather delegated approval of the plan to the Commission's staff in its Energy Division, with no provision for contemporaneous public notice, review or comment.[11] The Energy Division

[8] Cal. Pub. Util. Code § 454.5(c) ("The commission shall review and accept, modify, or reject each electrical corporation's procurement plan.").
[9] D.13-02-015 pp. 90-92.
[10] *Id.* at 90.
[11] *See id.* at 92.

approved the procurement plan, and SCE initiated an RFO process.

SCE filed an application on November 26, 2014, seeking Commission approval of eleven contracts arising from its RFO. On January 11, 2016, Assigned ALJ DeAngelis issued a proposed decision ("PD") approving, in part, the application, but deferring a decision on the Puente Project until conclusion of the environmental review process the CEC had undertaken. The same day, Assigned Commissioner Florio issued an alternate proposed decision ("Florio APD"), reaching the same conclusion. Both proposed decisions concluded that the communities surrounding the Puente Project were environmental justice communities.

The PD and Florio APD correctly hold that statutory requirements, decisional law, and policy mandates required SCE to take into consideration existing environmental justice factors when conducting the Moorpark sub-area procurement.[12] The two documents affirm that SCE was under a mandate to "'provide greater weight'" to criteria regarding "disproportionate resource siting in low-income and minority communities and environmental impacts."[13] The PD and APD reiterate the Commission's requirement that utilities "shall consider" environmental justice issues in evaluating bids from an RFO.[14] The PD and APD also affirm that "[w]hen making procurement decisions, utilities must not only seek preferred resources to meet an identified need, but actively prioritize preferred resources in disadvantaged communities[.]"[15]

Following the issuance of the PD and Florio APD, Commissioner Peterman issued a second APD ("Peterman APD") which proposed to approve the Puente contract. The Peterman APD initially found that the Commission did not have a responsibility to consider the environmental justice implications of utility procurement, but in response to comments that Commission decisions contained this exact requirement, the Peterman APD was revised to state these requirements were "dicta" that did not apply to the Moorpark RFO. The Peterman APD, with revisions that did not change the initial determination to approve the contract for the Puente Project, was approved by the Commission on May 26, 2016 as D.16-05-050 and formally issued on June 1, 2016.

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[12] PD and Florio APD, p. 17.
[13] *Id*, *citing* D.07-12-052, *Opinion Adopting Pacific Gas and Electric Company's, Southern California Edison Company's, and San Diego Gas & Electric Company's Long-Term Procurement Plans* (Dec. 21, 2007), p. 157.
[14] PD and Florio APD p. 17 (citing California Public Utilities Commission AB 57, AB 380, and SB 1078 Procurement Policy Manual (June 2010) at 4-8)).
[15] PD and Florio APD p. 17; Cal. Pub. Util. Code § 399.13(a)(7).

III. STANDARD OF REVIEW

Rule 16.1(c) requires an application to "set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous," with specific references to the record or law. Under Public Utilities Code Section 1757, a court reviews a Commission decision to determine whether any of the following occurred:

(1) The commission acted without, or in excess of, its powers or jurisdiction.

(2) The commission has not proceeded in the manner required by law.

(3) The decision of the commission is not supported by the findings.

(4) The findings of the decision of the commission are not supported by substantial evidence in light of the whole record.

(5) The order or decision of the commission was procured by fraud or was an abuse of discretion.[16]

In *Utility Reform Network v. Public Utilities Commission* (*TURN II*), the court of appeal held that Commission decisions will be "annulled" if the Commission fails to "proceed in the manner required by law" by "abus[ing] its discretion" in its choice of procedures or "unreasonably interpreting the statutes governing its procedures" and are "prejudicial."[17] The court of appeal has also held that the Commission abuses its discretion when it "fails to follow its own rules and regulations."[18]

IV. ARGUMENT

A. D.16-05-50 Commits Legal Error in Finding that Environmental Justice Procurement Requirements are Dicta that SCE Was Free to Ignore in Administering the Moorpark RFO.

D.16-05-050 improperly asserts the Commission is only required to assess the Puente Project on the "economic and reliability criteria laid out in D.13-02-015 and SCE's procurement plan[.]" The Decision improperly dismisses the environmental justice criteria explicitly identified in the Commission's Procurement Manual and prior decisions as "dicta." The

[16] Pub. Util. Code, § 1757(a).
[17] *TURN II*, 223 Cal. App. 4th 945, 958 (2014).
[18] *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 140 Cal. App. 4th 1085, 1106 (2006) (holding that the PUC's failure to comply with its own rules was prejudicial); *Util. Reform Network v. Pub. Utils. Comm'n*, WL 1059368, at *27180 (Cal. Ct. App., Mar. 16, 2012) (*TURN I*).

Decision then ignores the Commission's unique role in ensuring equitable procurement, claiming that "environmental justice issues are not only within the purview of CEC environmental review, but will be specifically considered in the CEC's review of the Puente Project."[19] It further claims that "[i]f the CEC determines that the project should not be permitted for environmental justice . . . reasons . . . , [the project] will not go forward."[20] By failing to acknowledge that the "criteria laid out in D.13-02-015" includes environmental justice in procurement, and by failing to apply other laws, rules and precedent, the Commission fails to proceed in the manner required by law.

1. Environmental Justice is an Established Procurement Consideration that Applied to the Moorpark RFO.

As recognized in the PD/Florio APD, D.07-12-052 specifies that "IOUs need to provide greater weight" to RFO criteria regarding "disproportionate resource sitings in low income and minority communities."[21] D.16-05-050 dismisses this requirement as "dicta" because D.07-12-052 does not additionally reference the consideration of environmental justice criteria in its Ordering Paragraphs and therefore, according to D.16-05-050, it "remains in effect as guidance, but the Commission to date has not yet provided further specificity regarding how the utilities should implement this guidance."[22] The Decision's reasoning fails for at least three reasons.

First, the Commission recently rejected arguments that policy statements prohibiting use of back-up generation in demand response were dicta because they were not contained in an ordering paragraph. As the Commission held, "[b]ecause the statement was not included in an ordering paragraph does not make it 'mere surplusage.' It is a settled rule of legal interpretation to avoid rendering particular terms as meaningless or mere surplusage."[23] Similarly here, D.16-05-050 cannot legitimately diminish the legal significance of environmental justice procurement requirements identified in D.07-12-052 simply because they were not specifically referenced in a decision's ordering paragraphs.

Second, the notion that D.07-12-052's environmental justice consideration is dicta

[19] D.16-05-050 pp. 16, 19.
[20] D.16-05-050 p. 10.
[21] D.07-12-052 p. 157; PD/Florio APD p. 17.
[22] D.16-05-050 p. 15.
[23] D. 14-12-024, Decision Resolving Several Phase Two Issues and Addressing the Motion for Adoption of Settlement Agreement on Phase Three Issues (Dec. 2014) p. 55.

pending further guidance is belied by subsequent Commission action to enshrine this requirement in utility procurement practice. After D.07-12-052 was issued, and absent further guidance, the Commission incorporated environmental justice considerations as a procurement evaluation criterion in its Procurement Manual. Citing to D.07-12-052, the 2010 Procurement Policy Manual includes "environmental justice issues" as one of the evaluation criteria "[t]he IOUs shall consider …in evaluating bids from an RFO."[24] Had the Commission viewed environmental justice as dicta requiring future guidance prior to its incorporation into utility procurement, it would not have acted to include environmental justice considerations in the Procurement Policy Manual.

Finally, nothing in D.07-12-052 suggests that implementation of environmental justice considerations in procurement must await additional "guidance." Indeed, no additional guidance is required for an IOU to consider whether its procurement impacts low-income or minority communities. For over a decade, utilities have been instructed to evaluate this exact issue in the context of renewable procurement. For example, in D.04-07-029, the Commission identified "benefits to low-income or minority communities" as factors in least-cost best-fit renewable selection and in D.03-06-071, the Commission identified these same benefits as factors to be evaluated in the bid evaluation process.[25] If a utility can consider the benefits of renewable development in low-income or minority communities, it can just as easily consider the harm to these same communities from siting of new polluting conventional generation.

There is no dispute that SCE did not consider environmental justice in implementing the Moorpark RFO. Both the Procurement Policy Manual and D.13-02-015's incorporation by reference of the procurement considerations identified in D.07-12-052[26] required SCE to evaluate the environmental justice implications of its proposed procurement. If the Commission is indeed "concerned about environmental justice issues"[27] it will enforce its own procurement requirements designed to protect vulnerable communities. Because SCE was required to

[24] CPUC AB 57, AB 380 and SB 1078 PROCUREMENT POLICY MANUAL (2010) p. 4-8, http://docs.cpuc.ca.gov/efile/RULINGS/118826.pdf; *see also* p. 4-9 (citing to D.07-12-052 at 157 as support for requiring consideration of environmental justice issues in utility procurement).
[25] For fuller explanation, see CEJA Opening Comments on Peterman APD, p.10 (citing D.03-06-071 at 68 (findings of fact No. 36); D.04-07-029 at 29)
[26] D.13-02-015 p. 131 (Ordering Paragraph 4).
[27] D.16-05-050 p. 18.

consider environmental justice in its procurement and failed to do so, the Moorpark RFO does not comply with D.13-02-015 and the Puente contract must be rejected.

2. SCE's Failure to Consider Environmental Justice in the Renewables Procurement Aspect of its All-Source RFO Is Inconsistent with Pub. Util. Code § 399.13(a)(7).

The Legislature specifically requires that utilities consider environmental justice when procuring renewable resources.[28] D.16-05-050 asserts that the Puente Project does not fall under the RPS Program and that consequently, Pub. Util. Codes §§ 399.11 – 399.31, which include an environmental justice mandate, are inapplicable.[29] This conclusion – that procurement of gas-fired generation like the Puente Project is not subject to RPS rules -- is true, but entirely irrelevant. Section 399.13(a)(7) specifically states that "in soliciting and procuring renewable energy . . . , each electrical corporation shall give preference to renewable energy projects that provide environmental and economic benefits to communities afflicted with poverty or high unemployment or that suffer from high emission levels of toxic air contaminants, criteria air pollutants, and greenhouse gases."

D.16-05-050 is incorrect in asserting that "Pub. Util. Code §399.13 does not apply to all-source procurement contracts."[30] As part of its solicitation and procurement for the Moorpark sub-area, SCE was required to, and did solicit and procure renewable energy resources that would meet SCE's RPS requirements. Indeed, in its solicitation, SCE sought "[o]ffers for [n]ew renewable projects," and specified that such renewables "qualify as Portfolio Content Category 1 [] in accordance with Pub. Util. Code § 399.16(b)(1)[]" including any "eligible renewable resource [that] is a generating facility that meets all the criteria set forth in [] Section 399.12[.]"[31]

D.16-05-050 cannot insert words into § 399.13 or the statutory framework to limit application of the legislative mandate. It cannot narrow the scope of that protection in any manner that frustrates the statutory purpose. It is well established that "statutory construction interpretations which render any part of a statute superfluous are to be avoided."[32] If the

[28] Pub. Util. Codes §§ 399.13(a)(7).
[29] D.16-05-050 p. 15; D.13-02-015 p. 36.
[30] D.16-05-050 p. 33.
[31] Exh. SCE-3 at E-135; Public Utilities Code § 399.13(a)(7) at n.3 (Appendix E to Testimony of SCE On the Results of its 2013 LCR RFO for the Moorpark Sub-Area, 2013 RFO LCR Transmittal Letter v. 2.0 November 12, 2013).
[32] *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207-08, as modified (Oct. 25, 2006)

legislature meant to limit application of requirement to RPS-only procurement, it would have done so clearly and expressly, but it did not.[33] For this reason, the Commission is required to adhere to the mandates in § 399.13(a)(7) when considering renewable procurement in all-source RFOs.

It is undisputed in the record that SCE did not, in either its solicitation or procurement efforts, express any preference for renewables in Oxnard, despite § 399.13(a)(7)'s explicit instructions to do so. Further, SCE did express a preference to renewables in Goleta—an area that has not been recognized as having environmental justice communities.[34] In ignoring environmental justice criteria in all aspects of implementation of the Moorpark RFO, SCE ran afoul of Public Utilities Code § 399.13(a)(7).

B. D.16-05-50 Fails to Comply with Cal. Gov't Codes §§ 65040.12(e) and 11135.

The Commission's decision to approve the Puente Project also violates Cal. Gov't Codes §§ 65040.12(e) and 11135. Section 65040.12(e) requires "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."[35] Section 11135 and its implementing regulations prohibit the state from utilizing criteria or methods of administration that have the effect of subjecting people to discrimination, or "perpetuat[ing] discrimination" by any recipient of state funding.[36] The Legislature has also created environmental justice statutory and policy mandates to be enforced by the Commission.[37] Moreover, "the Supreme Court

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citing (*E.g., In re Young* (2004) 32 Cal.4th 900, 907, 12 Cal.Rptr.3d 48, 87 P.3d 797; *1208 *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1002, 90 Cal.Rptr.2d 236, 987 P.2d 705; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1030, 68 Cal.Rptr.2d 655, 945 P.2d 1204.)

[33] S. *Cal. Edison v. Pub. Utils. Comm'n*, 227 Cal. App. 4th at 189 (2014).

[34] Specifically, SCE witness Bryson testified that Edison emphasized the procurement of preferred resources at its bidder conference, but never emphasized the need for preferred resources in Oxnard. (Exhibit SCE-1, Bryson direct written testimony, p.15.) He testified that SCE "emphasized [the] . . . desire for preferred resources in the Moorpark area and then more specifically a preference for resources in Goleta." (Evidentiary Hearing Transcript, vol. 1 (redacted) p. 151). He unequivocally testified that "Edison never communicated a need or preference for preferred resources to benefit Oxnard particularly." *Id*. SCE witness Singh acknowledged that SCE gave "qualitative preference" to renewables in general, but never considered a qualitative advantage to renewable projects in disadvantaged communities like Oxnard. *Id*. at 40.

[35] Cal. Gov. Code § 65040.12(e).

[36] Cal. Gov. Code. § 11135; 22 CCR § 98101(i), (j).

[37] *See* Pub. Util. Code § 399.13(a)(7)(discussed above); SB 43 Green Tariff Shared Renewables program

established that . . . the PUC [is empowered] to adopt policies about whether the conduct of electric utilities are a risk to public health[.]"[38]

The Commission has abided by these directives in exercising its power to adopt policies regarding environmental justice. Indeed, as discussed above, the Track 1 decision requires SCE to follow a previous decision, D.07-12-052, which states that utilities "need to provide greater weight" to criteria regarding "disproportionate resource siting in low-income and minority communities and environmental impacts."[39] Citing to D.07-12-052, the Commission's Procurement Policy Manual explains that IOUs "shall provide greater weight to selection of projects that do not result in disproportionate resource sitings in" such communities.[40] The Commission is not at liberty to ignore environmental justice in this proceeding; by doing so D.16-05-050 runs afoul of the state's anti-discrimination laws.

C. D.16-05-050 Errs in Relying on a Procurement Plan Approved by Energy Division to Excuse SCE's Failure to Consider Environmental Justice in Procurement.

SCE's procurement plan was developed through a confidential process that did not provide for public review and comment, and was approved by Energy Division, not the Commission. Yet D.16-05-050 attempts to excuse SCE's failure to consider environmental justice as a procurement criterion by pointing to the procurement plan's omission of explicit reference to environmental justice considerations. As an initial matter, the Decision's suggestion that the procurement plan does not incorporate environmental justice criteria is incorrect. SCE's procurement plan states that "*First and foremost*, pursuant to Ordering Paragraph 4, RFOs issued in accordance with D.13-02-015 must meet all previous CPUC requirements (including D.07-12-

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set aside for disadvantaged communities in the top 20% of CalEnviroScreen (Pub. Util. Code § 2833(d); SB 350 Clean Energy and Pollution Reduction Act containing multiple mandates regarding disadvantaged communities, including early priority on minimizing emissions in disadvantaged communities (Pub. Util. Code § 454.52(H)); AB 327 Net Energy Metering requiring NEM alternatives designed for growth in disadvantaged communities (Pub. Util. Code § 2827.1); and AB 693 Multi-Family Low Income Housing directing funds to install rooftop solar in disadvantaged communities & low-income housing (Pub. Util. Code § 2870.)

[38] *S. Cal. Edison Co. v. Pub. Utilities Comm'n*, 227 Cal. App. 4th 172, 193 (2014), as modified (June 18, 2014).

[39] *See* D.07-12-052, Opinion Adopting Pacific Gas and Electric Company's, Southern California Edison Company's, and San Diego Gas & Electric Company's Long-Term Procurement Plans (Dec. 21, 2007), p. 157.

[40] Procurement Policy Manual p. 4-9 (emphasis added); *id*. at 4-8. Manual cited as authority in D.14-02-040 pp. 4-5.

052)."[41] The procurement plan's use of "first and foremost" makes clear that the additional procurement considerations identified in D.07-12-052, which include environmental justice, apply to the Moorpark RFO.

Moreover, the Decision improperly finds that:

> This proceeding appropriately considers whether SCE followed its procurement plan, not whether the plan itself was adequate. …pursuant to D.13-12-015, Energy Division approved SCE's procurement plan … in September 2014. If CEJA or another party contended that the process authorized in D.13-02-015 for review of SCE's procurement plan was unlawful, they could have filed an application for rehearing of that decision on this point."[42]

D.16-05-050 cannot lawfully rely on an Energy Division approved procurement plan to determine SCE's compliance with Commission procurement requirements, nor claim parties waived their right to object to the plan especially, where, as here, parties had no prior opportunity to raise an objection to the plan's contents. In failing to conduct Commission review of SCE's procurement plan, either prior to implementation or upon consideration of the application for approval, the Commission has unlawfully denied the parties their constitutional right to due process. This failure to subject SCE's procurement plan to a Commission review process violates Pub. Util. Codes section 454.5 as well as the Commission's own rules and prior decisions. The Commission itself has recognized this due process right in a prior decision.[43]

1. The Commission Cannot Lawfully Delegate its Power to the Energy Division without Retaining Final Approval and Review.

In its Track 1 Decision, the Commission refused to review SCE's proposed procurement plan, and instead delegated this power of review to the Energy Division, which approved a modified version of the plan on September 4, 2013. The Energy Division did not provide public notice of its approval, and consequently, CEJA and Sierra Club did not have the opportunity to review or object to the plan at that time. CEJA stated its objections to SCE's procurement plan during this proceeding, at CEJA's first opportunity to do so, and the opportunity to raise objections to a procurement plan review and approval cannot lawfully be denied.

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[41] Exh. SCE-10 p. 32 (emphasis added); *also available at* https://www.sce.com/wps/wcm/connect/0a312536-5ba4-4153-a3bd-0859e15badeb/TrackI_SCELCRProcurementPlanPursuanttoD1302015.pdf?MOD=AJPERES.
[42] D.16-05-050 p. 18.
[43] *See* D.14-08-008.

In D.16-05-050 the Commission contends that its review is appropriately limited to considering "whether SCE followed its procurement plan" and that the Decision was not required to address "whether the plan itself was adequate."[44] However, it is the Commission's statutorily-mandated duty, not the Energy Division's, to review and approve IOU procurement plans.[45] While the Commission can transfer day-to-day ministerial tasks to subordinates on staff, "powers conferred upon public agencies . . . which involve the exercise of judgment or discretion . . . cannot be surrendered or delegated to subordinates in the absence of statutory authorization."[46]

The court in *Southern California Edison Co. v. Public Utilities Commission* explained "the difference between delegable program administration and non-delegable policy and oversight duty."[47] Non-delegable oversight includes activities that "involve formal decision-making on program elements, funding levels and ratemaking, which are the lawful obligations of the [Public Utilities] Commission[.]"[48] Delegable program administration, in contrast, "involves day-to-day operations requiring little discretion[.]"[49] Thus, "public agencies may delegate the performance of ministerial tasks while retaining for themselves general policymaking power to determine the terms and conditions."[50] However, an agency's delegation is unlawful if "there has been [a] "total abdication of . . . authority." Here, D.16-05-050 engages in just such an abdication in claiming the Commission's role is limited to determining if the Puente Project is consistent with a procurement plan it delegated to staff for approval.

Notably, in D.14-04-008, after parties contested SDG&E's procurement plan, the Commission determined that:

> Approval of SDG&E's procurement plans by Energy Division, once they are deemed to be consistent with D.14-03-004, does not infringe on the due process rights of parties to contest any specific procurement contracts or methods proposed by SDG&E in forthcoming applications. [51]

Accordingly, procurement plan compliance is irrelevant in determining the legitimacy of SCE's

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[44] *Id.*
[45] Cal. Pub. Util. Code § 454.5.
[46] *S. Cal. Edison v. Pub. Utils. Comm'n*, 227 Cal.App.4th 172 at 195.
[47] *Id*. at 196.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] D.14-08-008 p. 11 (emphasis added).

actual procurement process, or the resulting contract with the Puente Project. The Decision's reliance on the procurement plan, such as in stating that "SCE properly acted upon its reviewed plan" is therefore improper and does not support contract approval.

2. The Decision's Conclusion that Parties Waived Rights to Challenge the Procurement Plan Violates Due Process and is Inconsistent with Commission Precedent.

The Decision erroneously posits that if parties had objections to the review process laid out in the Track 1 Decision, whereby the Energy Division reviewed the approved procurement plan prior to SCE's launching of procurement activities, parties should have filed an application for rehearing of the Track 1 Decision.[52] This reasoning cannot stand because it denies parties' due process rights and the rights to notice and to be heard. Given the procurement plan was not made public until after approval by Energy Division and no opportunity for public comments was provided, this proceeding was the only opportunity for parties to object to the plan's contents. Indeed, the Track 1 Decision specifically provides that the Commission would "allow SCE the flexibility it seeks, subject to review of its procurement plan by Energy Division *and a subsequent Commission application*."[53] By the terms of the Track 1 Decision, it was reasonable for the public to assume, being denied any right to review the procurement plan prior to Energy Division approval, it could challenge the plan in SCE's subsequent application and further expect the Commission to perform its statutory duties to evaluate SCE's Application independent of the terms of the procurement plan. Accordingly, CEJA properly raised its objections to the procurement plan in this proceeding, its only legitimate opportunity to do so. In order to protect CEJA's procedural rights, the Commission must allow CEJA "the right to contest" the procurement plan when it delegates its approval authority to the Energy Division.[54]

Finally, there can simply be no waiving of rights where there is no process for public notice and comment. When the Commission undertakes a discretionary decision, as review and approval of a procurement plan is, the Commission's rules require it to follow specific procedures. For example, when deciding an application, the Commission follows Article 2, including Rule 2.6, which provides for participation. When engaging in rulemaking, the

[52] D.16-05-050 p. 18.
[53] D. 13-02-015 p. 90.
[54] *See* D.14-08-008 p. 11.

Commission is bound by Article 6, including notice and opportunities for comments. These procedures are binding on the Commission, and parties can rely on them to safeguard their due process rights. Because no opportunity was provided here, no rights were waived.

D. The Commission Was Required to Await Completion of Environmental Review at the California Energy Commission Prior to Approving the Puente Contract.

CEQA prohibits a responsible agency from acting on a project until it has considered a project's environmental effects as described in the certified final EIR for the project.[55] Because the Commission is a responsible agency for the Puente Project, it may not approve the Puente contract until completion of environmental review at the CEC.

The 262 MW NRG Energy Center is a "project" under CEQA. A "Project" is any activity that has the potential to cause a direct or reasonably foreseeable indirect physical change in the environment, and includes activities involving the issuance of a lease, permit, license, or other entitlement for use by a public agency.[56] An agency with discretionary approval over a project, but which is not the "lead" agency, has duties as a "responsible agency."[57] The Commission here is a responsible agency because the contract for the Puente Project is a key approval that will determine whether the plant is constructed. Absent an approved contract, it is highly unlikely that the facility would obtain sufficient financing and generate sufficient revenue to merit construction and operation.

As a responsible agency, the Commission must await completion of CEQA review by the lead agency, which is the CEC.[58] This is critical to ensuring that the CEC's environmental analysis is not prematurely limited to preclude meaningful compliance with CEQA's mandates. CEQA requires that the CEC's environmental review include an evaluation of feasible alternatives to avoid or reduce a project's potentially significant impacts.[59] A robust and unprejudiced review of alternatives is particularly important in this case given the Puente Project's location in a disadvantaged community, its vulnerability to sea level rise and coastal

[55] CEQA Guidelines, 14 Cal. Code Regs. § 15096(f).
[56] Pub. Res. Code § 21065; CEQA Guidelines, 14 Cal. Code Regs. § 15378(a).
[57] California Public Resources Code § 21069; CEQA Guidelines, 14 Cal. Code Regs. § 15096.
[58] CEQA Guidelines § 15096(f). ("Prior to reaching a decision on the project, the responsible agency must consider the environmental effects of the project as shown in the EIR or negative declaration.")
[59] CEQA Guidelines, 14 Cal. Code Regs. § 15126.6(a).

flooding, and the potential for smaller project size or alternative location. However, not only does the contract for the Puente Project lock in project size and location, but NRG and SCE have structured their contract to render denial of the Project impossible once it receives Commission approval. NRG witness Gleiter testified that once the contract receives the Commission's approval, failure to secure CEC approval would expose NRG to approximately $24 million in penalties, which would, in effect, make any alternative to the project infeasible.[60] In approving the contract for the Puente project prior to the completion of environmental review at the CEC, the CPUC has impermissibly compromised the integrity of the CEQA process and reached determinations, such as the reliability risks posed by the project's vulnerable location, prior to the robust vetting of these concerns that is a product of the CEQA process.

E. The Commission's Approval of Least Cost Best Fit and Applicability of One, but not All Procurement Criteria is Not Based on Admissible Evidence in the Record.

The Commission incorrectly relied on hearsay, defined as "evidence of a statement that was made other than by a witness while testifying . . . that is offered to prove the truth of the matter stated,"[61] in approving the Puente Project procurement decision. The Commission, like all other public agencies, must base its decisions on "substantial evidence" in the record—not hearsay.[62] Hearsay evidence "cannot be the basis for an evidentiary finding without corroboration where the truth of the out-of-court statements is at issue."[63] Further, "documentary evidence . . . introduced for the purpose of proving the matter stated in . . . writing is hearsay per se because the document is not a statement by a person testifying at the hearing."[64]

The Decision errs in concluding that SCE relied on both quantitative (and non-hearsay) factors and qualitative (and admittedly hearsay) factors to award the contract for the Puente Project. It takes at face value SCE's assertion that "the qualitative factors reinforced SCE's quantitative assessment that the NRG Energy Center was the best option to meet the LCR need."[65] To the contrary, after applying its quantitative factors, SCE realized that the Puente

[60] SCE, Gleiter, Hr'g Tr. Vol. 2, pp. 336-37.
[61] *In Re Pac. Gas & Elec. Co.*, D.00-10-002, 2001 WL 1131831 (July 12, 2001).
[62] *TURN*, 223 Cal. App. 4th 945, 960 (2014).
[63] *Id*. at 961.
[64] *Id*. at 7.
[65] D.16-05-050, pp. 25-26.

Project "would trigger debt equivalence issues, regardless of the inclusion of the Embedded Put Option." Specifically, the "energy and AS value associated with this low utilization peaker was too low and did not represent more than a minor amount of the output. To minimize the impact of this contract on its balance sheet, SCE structured the contract as a fixed price RA contract."[66] In other words, the quantitative analysis resulted in an offer SCE could not accept. SCE did not, in fact, combine "qualitative and quantitative factors"[67] to arrive at its conclusion to award a contract for the Puente Project; it relied on the hearsay, qualitative factor to offer to restructure the terms with NRG.

The qualitative factor was an assumed a resource shortage due to the "supposed *possible* retirement of the Mandalay and Ellwood peakers"[68] if the NRG contracts were not awarded. While this concern was woven throughout SCE's application, it is a concern grounded solely on hearsay and uncorroborated evidence that cannot be relied upon by the Commission.

The Decision points to no substantial evidence in the record supports SCE's reliance on its concern that NRG may retire its Mandalay and Ellwood peakers absent the contract at issue, and the qualitative high marks it accorded NRG's offers on that basis. The reasonableness of SCE's concerns and assigned qualitative benefits to the Puente Project can be determined only by judging the legitimacy of the underlying grounds for those concerns. The evidence in the record, however, shows SCE's concerns are baseless. It was unreasonable to assign the NRG Oxnard contract a key qualitative benefit. Without substantial admissible record evidence, the Commission cannot make a finding supporting SCE's qualitative assessment of the NRG contracts before it.

Further, and more concerning, the Commission has never recognized capacity reliability concerns due to the possible retirement of NRG's Mandalay and Ellwood peakers. The Commission's Track I decision only authorized SCE to procure 215-290 MW based on the determination that OTC generators would retire due to new state requirements—not the determination that NRG's plants would retire. The Track 1 decision specifically states that the Commission will "evaluate whether there are additional LCR needs for local reliability areas in CA" "in the next long-term procurement proceeding."[69] While NRG participated in the

[66] SCE-1, SCE Testimony p. 48.
[67] D.16-05-050 p. 26.
[68] *Id.*.
[69] D.12-03-014, p. 3.

Commission's proceedings leading to the Track 1 decision, it never indicated its intention to retire either of its peakers. Nothing in the Track I decision suggests that the Commission had reason to believe that NRG would retire the peakers upon retiring the OTC units if it could not add to its Moorpark Subarea GHG business portfolio.

These mere assertions in comments or argument do not qualify as evidence. Indeed, the court in *Util. Reform Network* squarely held that the Commission may not base a finding or determination about reliability need on uncorroborated evidence. In that proceeding, the Commission reviewed declaratory evidence asserting that a power plant was necessary because "there [would] be a shortage or gap of [resources] for meeting system-wide capacity needs, [which] . . . would pose significant challenges to the reliable operation of the grid," with the witness stating there was concern for the problem. The court rejected this evidence as hearsay, determining that the record was devoid of "other competent, substantial evidence to support the Commission's decision." Based on that result, the same result is required here.

V. CONCLUSION

The Commission violated CEJA's and Sierra Club's rights to due process, failed to proceed in a manner required by law, failed to follow its own rules and regulations, and abused its discretion in approving the Puente Project contract. For these reasons, the Commission should revisit its decision approving the Puente Project and grant this Application for Rehearing.

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Respectfully submitted,

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